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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Refugee Act of 1980 requires an alien seeking asylum to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), 1158(a). The question presented is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution "on account of" that person's political opinion.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The amended opinion of the court of appeals, Pet. App. 5a-25a, is reported at 921 F.2d 844. The initial opinion of the court of appeals is reported at 908 F.2d 1452. The opinion of the Board of Immigration Appeals denying respondent's motion to reopen his deportation proceeding, Pet. App. 27a-33a, is unreported. The opinion of the Board of Immigration Appeals denying respondent's motion for reconsideration of its dismissal of respondent's appeal, Pet. App. 34a-36a, is unreported. The opinion of the Board of Immigration Appeals dismissing respondent's appeal, Pet. App. 37a-38a, is unreported. The oral opinion of the Immigration Judge, Pet. App. 39a-42a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A petition for rehearing was denied on January 10, 1991. Pet. App. 26a. The petition for a writ of certiorari was filed on February 25, 1991, and was granted on May 13, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 201(a) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102-103, added Section 101(a)(42) to the Immigration and Nationality Act of 1952 and is codified at 8 U.S.C. 1101(a)(42). It provides:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality,

membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 201(b) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 105, added Section 208(a) of the Immigration and Nationality Act and is codified at 8 U.S.C. 1158(a). It provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

STATEMENT

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, limits eligibility for asylum to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). A "refugee" is defined to be any person who has left his native country and is unwilling to return there "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular

social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

Respondent Jairo Jonathan Elias Zacarias left his native Guatemala after two masked guerrillas armed with machine guns asked him to join their army and, when he declined to join, told him to "think it [over] well." Pet. App. 7a. In his deportation proceeding, respondent applied for asylum and withholding of deportation on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion. The Immigration Judge and the Board of Immigration Appeals denied the requested relief because the guerrillas did not threaten to harm respondent if he refused to join them, and because any implicit threat was not "on account of" his political opinion.

The Ninth Circuit reversed and found respondent eligible for asylum. It held that the Guatemalan guerrillas' practice of forcible recruitment made it reasonable for respondent to take the admonition to "think it [over] well" as a threat. Pet. App. 16a-17a. Moreover, the court said that the threat was "properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Id.* at 12a. On the basis of its conclusion that respondent was a "refugee" within the meaning of the 1980 Act, the court of appeals remanded for the BIA to determine whether respondent should be granted asylum. *Id.* at 25a.

1. Respondent was eighteen years old when he left his native Guatemala in March 1987, a few months after two masked guerrillas came to his home. The guerrillas were armed with machine guns and asked

respondent to join their army. Respondent refused to join, even though the guerrillas offered to pay him to fight for them. The guerrillas told respondent to "thing it [over] well" and said that they would be back. Respondent remained at home and continued to work at his regular job for the next two months before he decided to leave Guatemala for the United States. Pet. App. 6a-7a, 32a, 40a-41a; C.R. at 37.

2. Respondent was apprehended for entering the United States without inspection. In his deportation hearing, respondent conceded his deportability and requested asylum and withholding of deportation. Pet. App. 40a. The Immigration Judge denied the requested relief. "Considering all the evidence," the Immigration Judge determined that "it does not appear that the respondent has established that he is a refugee within the meaning of 101(a)(42) of The Act" because he has "failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Pet. App. 41a-42a.

3. The Board of Immigration Appeals (BIA) summarily dismissed respondent's appeal when his counsel failed to file a brief or statement on his behalf. Pet. App. 38a. Respondent then moved the BIA to reconsider its dismissal. The BIA denied the motion for reconsideration; treating the motion as one to reopen respondent's deportation proceeding, it denied the motion because "there has been no evidentiary showing by the respondent that would warrant the relief originally requested, or that the decision of the immigration judge would be reversed." *Id.* at 36a.

Respondent then moved the BIA to reopen his deportation proceeding and to consider new evidence in

support of his appeal. The new evidence was a letter from respondent's father saying that the guerrillas had visited the family's home twice since respondent left Guatemala: once in January 1988, and again in April 1988. In the January visit, the guerrillas asked for respondent's father and mother and left when they found that the father was not at home. In the April visit, the guerrillas asked for respondent, but were told that he was in the United States. Both visits were for the purpose of attempting to recruit respondent. Pet. App. 31a.

The BIA determined that the letter from respondent's father "not only has failed to sustain his burden for reopening, * * * but also has failed to produce evidence that would establish a well-founded fear of persecution under the Act." Pet. App. 31a. "Even though the respondent alleges that he was threatened by the guerrillas, the evidence of record does not bear this out"; "there was no threat made to the respondent that he would be harmed if he refused to join them." *Id.* at 32a. Even if the guerrillas had threatened respondent, the BIA held, it was for the purpose of satisfying their need for soldiers and not "on account of" any political opinion held by respondent:

> [I]n our decisions in *Matter of Vigil*, Interim Decision 3050 (BIA 1988), and *Matter of Maldonado*, Interim Decision 3041 (BIA 1988), we opined that when a guerilla organization attempted to recruit someone, the initial encounter was important to examine in order to determine the motivations of the guerrillas. In this case, the guerrillas wanted the respondent to join them, and according to respondent's father, even offered to pay the respondent for his services. In respondent's brief in support of his latest motion, he acknowledges that the subsequent visits by the guerrillas were also an attempt to recruit him in order for him to assist the guerrillas in their attempt to violently overthrow the Guatemalan Government. It can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive.

Pet. App. 32a-33a. The BIA concluded that respondent "failed to show, by his new evidence, a *prima facie* eligibility for asylum or that the results of respondent's deportation hearing would be changed." *Id.* at 33a. Accordingly, it denied the motion to reopen. *Ibid.*

4. The Ninth Circuit reversed. Pet. App. 5a-25a. It found respondent eligible for asylum, based on the evidence presented to the immigration judge, on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion. *Id.* at 6a. At the same time, the court held that the letter from respondent's father did not require the BIA to reopen the deportation proceeding with respect to his withholding of deportation claim. *Ibid.*[1]

With respect to respondent's asylum claim, the court first noted that the record before the Immigration Judge included an advisory opinion from the State Department on the merits of respondent's application for relief. Pet. App. 7a. Although the letter advised that respondent was *not* a refugee, *ibid.*,

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[1] An alien found eligible for withholding of deportation is entitled, without more, to that relief. An alien found eligible for asylum may still be denied that status in the discretion of the Attorney General. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987); *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

the court read it to support respondent's claim that "the guerrillas engage in forced recruitment." *Id.* at 8a. "Because nongovernmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution." *Id.* at 12a. "The persecution is properly categorized as 'on account of political opinion,'" according to the court, "because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Ibid.*

Turning to the facts of the case before it, the court of appeals found that respondent was eligible for asylum. Pet. App. 16a. "[I]n light of the guerrillas' practice of using force to recruit people, it certainly was reasonable for a person in [respondent's] situation to take the statements [to 'think it [over] well'] as threats." *Id.* at 17a. Furthermore, the court said, "the threat to [respondent] was for political as opposed to personal reasons." It explained: "[T]he Board did not suggest that the individual guerrillas who appeared at his door had a personal quarrel with [respondent], and in any event, there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [respondent] to further the *group*'s political goals. There was thus a reasonable possibility, based on the evidence presented [to the Immigration Judge], that the guerrillas would return and take [respondent] by force, thereby persecuting him on account of political opinion." *Id.* at 18a.

Although it concluded that the evidence showed that respondent was eligible for asylum, the court added that respondent's evidence "failed to prove the 'clear probability' of persecution necessary to obtain

withholding of deportation." Pet. App. 18a. It observed that the letter from respondent's father "did not cure the key deficiency in his withholding of deportation claim"—namely, the lack of specific evidence demonstrating that "forced recruitment was more than a reasonable possibility." *Id.* at 25a. Accordingly, the court upheld the BIA's denial of respondent's application for withholding of deportation, but remanded the case so that the BIA could exercise its discretion whether to grant respondent's asylum application. *Ibid.*[2]

SUMMARY OF ARGUMENT

The Refugee Act of 1980 authorizes the Attorney General to grant asylum only if he determines that an alien is unwilling to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

A. The language of the Refugee Act pertinent to this case requires the victim to hold a "political opinion" and to fear persecution because of that opinion. By referring to persecution "on account of" political opinion, Congress necessarily limited refugee status to those who hold political opinions. The state of mind of the persecutor is also an element, since "persecution" means the infliction of suffering on a person because of the victim's beliefs. Thus, the persecutor's state of mind is determinative of whether per-

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[2] Before denying a petition for rehearing, Pet. App. 26a, the panel issued an order amending its opinion, *id.* at 2a-5a. The opinion reprinted in the Appendix, *id.* at 5a-25a, incorporates those amendments.

secution is "on account of" a political belief held by the victim.

The definitions of "refugee" in the international acts from which the Refugee Act's definition was taken—the 1946 Constitution of the International Refugee Organization, the 1951 United Nations Convention, and the 1967 United Nations Protocol—likewise require that persecution be "for reasons of," "based on," or "because of" the victim's race, beliefs, or nationality. Other legislative history of the Refugee Act confirms that it is necessary to focus both on the victim's characteristics or convictions and on the persecutor's intent to inflict harm on their account; indeed, Congress rejected a bill that would have extended asylum eligibility beyond refugees thus defined to include "dispaced persons." The BIA has interpreted the Refugee Act to require proof of the persecutor's intent to harm the applicant because of one of the five listed reasons, and has determined that forced recruitment by either a guerrilla organization or a government does not necessarily constitute persecution "on account of * * * political opinion." That construction is entitled to substantial deference.

B. A guerrilla group's conscription of soldiers is not necessarily (or even usually) motivated by an intent to discriminate against a person because of his political beliefs. It is true that forcible conscription by a guerrilla group has a political goal. It is also true that a person confronted with a credible threat of forcible conscription may have a well-founded fear of physical injury or worse if he does not go voluntarily. But those two facts, which, at best, are all that respondent established in this case, do not satisfy the statutory requirement that limits eligibility for asylum to persons with a "well-founded fear of persecution on account of * * * political opinion."

Contrary to the conclusion of the court of appeals, a threat made to achieve a political *objective* is simply not equivalent to persecution on account of political *opinion*. A person might be entirely sympathetic to the goals of the guerrillas, and share every one of their political beliefs, but not want to serve in their army. That person is faced with the same threat of forcible conscription as one who is entirely hostile to the guerrillas' program. Conversely, a person might share none of the guerrillas' views but be happy to sign for a decent wage. It should be obvious that neither of those persons has any fear of "persecution on account of * * * political opinion."

In his encounter with the guerrillas, respondent did not profess to have any political opinions, let alone to disagree with those espoused by the guerrillas. As concerns their behavior, "[i]t can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive." Pet. App. 32a-33a. To the contrary, the BIA specifically stated that the guerrillas sought to recruit respondent only so that he could assist them in their efforts to overthrow the Guatemalan government—"even offer[ing] to pay the respondent for his services." *Id.* at 32a. Since the guerrillas' threats were not made on account of his political opinions, respondent is not eligible for asylum under the Refugee Act.

ARGUMENT

A GUERRILLA ORGANIZATION'S ATTEMPT TO COERCE A PERSON INTO PERFORMING MILITARY SERVICE IS NOT NECESSARILY PERSECUTION "ON ACCOUNT OF * * * POLITICAL OPINION" WITHIN THE MEANING OF THE REFUGEE ACT

An applicant for asylum must establish four elements to be eligible for that relief: (1) that he is outside his country of nationality; (2) that he "is unable or unwilling" to return to and avail himself of the protection of that country; (3) that such inability or unwillingness is "because of persecution or a well-founded fear of persecution"; and (4) that such persecution is "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). As this case comes to this Court, only the fourth element remains at issue.

A. Persecution "On Account Of * * * Political Opinion" Means The Infliction Of Suffering Because Of The Victim's Political Beliefs

Asylum eligibility is limited to persons who reasonably fear persecution on account of the five reasons listed in the statute, including their political opinions. That proposition is apparent from (1) the language of the Refugee Act, (2) the international acts which supplied the definition of "refugee" in the Refugee Act, and (3) the legislative history of the Refugee Act.

1. In the absence of congressional definition or common law meaning, the phrase "persecution on account of * * * political opinion" in the Refugee Act "must be given [its] ordinary meaning." *Chapman* v. *United States*, No. 90-5744 (May 30, 1991),

slip op. 7; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (giving definition of "refugee" in Refugee Act its "ordinary and obvious meaning"). The ordinary meaning of "persecution," at the time Congress passed the Refugee Act in 1980, was the infliction of suffering because of the victim's race, beliefs, or nationality, especially religious beliefs. See 7 *The Oxford English Dictionary* 721 (1933) ("The action of persecuting or pursuing with enmity and malignity; *esp.* the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it."); *The Random House Dictionary of the English Language* 1074 (1966) ("[A] program or campaign to exterminate, drive way, or subjugate a people because of their religious, ethical, or moral beliefs or practices: *the persecutions of Christians by the Romans.*"); *Webster's Second New International Dictionary of the English Language* 1826 (1957) ("The act or practice of persecuting or an instance of such. Specif.: a[.] The infliction of sufferings or death on those adhering to a creed or mode of worship regarded as heretical or offensive; as, the *persecution* of the early Christians."). The "on account of" clause in Section 1101(a)(42)(A), which immediately follows the term "persecution," limits the reach of the Refugee Act to the five bases for persecution listed in the statute, one of which is the victim's "political opinion." See *The Random House Dictionary of the English Language*, *supra*, at 10 (defining "on account of" to mean "by reason of; because of"); *Webster's Second New International Dictionary*, *supra*, at 16 (defining "on account of" to mean "[f]or the sake of; by reason of; because of").

The court of appeals offered two interpretations of "persecution on account of * * * political opinion."

Pet. App. 12a. First, it construed that phrase to require an asylum applicant to "express[] a political opinion hostile to the persecutor." Second, it read that phrase to mean that "the persecutors' motive * * * is political." *Ibid.* As applied by the court of appeals neither interpretation (alone or together) respects the limiting language chosen by Congress.

The first proposition simply ignores the "on account of" clause. That clause requires persecution to be *because of* political opinion. The asylum applicant may "express[]" a political opinion, but if the persecutor's disagreement with that opinion did not in fact cause the persecution, then the persecution is not "on account of * * * political opinion." The applicant's political opinion is a necessary, but not a sufficient, condition of asylum eligibility.

The second proposition recognizes the causation required by the "on account of" language, but profoundly misunderstands the nature of "persecution." "Persecution" is the infliction (or threatened infliction) of suffering on a person because of *that person's* characteristics, not the persecutor's. It is irrelevant that the persecutor's motives are "political" in nature, or that the persecutor has "political goals," Pet. App. 18a; unless the persecutor intends to hurt the asylum applicant because of *the applicant's* political opinion, the applicant is not eligible for asylum.

2. The international agreements from which Congress drew the definition of "refugee" in the 1980 Refugee Act support the reading of "on account of * * * political opinion" as a limitation on asylum eligibility to those who are harmed or threatened with harm because of their political beliefs. The definition of "refugee" in the 1980 Refugee Act originated in the 1946 Constitution of the International Refugee Organization (IRO). See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 437 (1987). Responding to the persecution perpetrated by the fascist powers before and during World War II, the IRO defined as "refugees" those persons who were outside their native country and were "victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war"; "Spanish Republicans and other victims of the Falangist regime in Spain"; and "persons who were considered refugees before the second world war, for reasons of race, religion, nationality or political opinion." IRO Const., Annex 1, Pt. 1, § A1(a)-(c), 62 Stat. 3049. The IRO also defined as refugees persons "of Jewish origin or foreigners or stateless persons" who were returned to their native country by "enemy action" and became "victims of nazi persecution." IRO Const., Annex 1, Pt. 1, § A3, 62 Stat. 3049-3050. The IRO allowed refugees to decline to be repatriated to their native country if they had a "valid objection" such as "persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions." IRO Const., Annex 1, Pt. 1, § C1(a)(i), 62 Stat. 3050; see International Refugee Organization, *Manual for Eligibility Officers* No. 175, ch. IV, Annex 1, Pt. 1, § C19, at 24 (undated, circulated in 1950) ("Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to *his* religious or political convictions or to *his* race, he is afraid of discrimination, or persecution, on returning home." (emphasis added)).

The IRO definition of "refugee" was incorporated into the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. at 152, whose definition of "refugee" was in turn revised in the 1967 United Nations Protocol Relating to the Status of

Refugees, Jan. 31, 1967, 19 U.S.T. 6225, T.I.A.S. No. 6577, to apply to persons who became refugees after January 1, 1951. The United States acceded to the Protocol in 1968. 19 U.S.T. 6257. In 1980, Congress, in enacting the Refugee Act, conformed the definition of "refugee" in United States immigration law to that in the 1967 Protocol. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. at 437; S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980); S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979).

The 1946 Constitution of the IRO, the 1951 United Nations Convention, and the 1967 United Nations Protocol all require that persecution be "for reasons of," "based on," or "because of" the victim's race, beliefs, or nationality.[3] The drafters of these instruments had in mind the many victims of fascist racial and ideological persecution. "Refugees," as defined

[3] The definition of "refugee" in the French text of the 1951 Convention (which is "equally authentic" with the English text, 189 U.N.T.S. at 184), underscores that persecution of a person because of his beliefs is an essential element of refugee status. The French text defines "refugee" as any person

> Qui * * * craignant avec raison d'être persécutée du fait de *sa* race, de *sa* religion, de *sa* nationalité, de *son* appartenance à un certain groupe social ou de *ses* opinions politiques, se trouvre hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays.

Id. at 153 (emphasis added). The use of the possessive pronouns "son," "sa," and "ses," refers to the victim's race, religion, nationality, membership in a social group, and political opinions. *Cassell's French Dictionary* 687 (1962); see *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1489, 1493-1494 (1991) (directing treaty interpretation to "begin with the text" and approving use of French dictionaries in construing the authoritative French text of the Warsaw Convention).

by the examples in these instruments, were not unwilling conscripts or the victims of war's dislocation; they were instead those who were made to suffer for their race, their beliefs, or their nationality.

3. Testimony before Congress, and statements by its Members individually and through committees, establish unequivocally that the legislators understood the term "refugee" to include only those persons persecuted because of their race, beliefs, or nationality.[4]

What is more, Congress rejected a bill that would have extended asylum eligibility to "displaced persons" because Congress wanted to prevent expansion of "the numbers of refugees eligible to come to the United States." H.R. Rep. No. 608, 96th Cong., 1st

[4] See, *e.g.*, H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979) (defining "refugee" to include "political or religious dissidents" and "prisoners of conscience"); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 69 (1979) (statement of Richard Clark, Coordinator of Refugee Affairs) (using "because of" for "on account of"); *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 14 (1977) (statement of Rep. Eilberg) (using "based on" for "on account of"); *id.* at 36 (testimony of James Carlin, Deputy Coordinator for Human Rights and Humanitarian Affairs, U.S. Department of State) (using "because of" for "on account of"); *id.* at 39 (testimony of James Carlin, Deputy Coordinator for Human Rights and Humanitarian Affairs, U.S. Department of State) (introducing document issued by the United Nations High Commissioner for Refugees describing the 1967 Protocol as prohibiting "the refoulement or forcible return of a refugee to any territory where his life or freedom would be threatened on account of *his* race, religion, nationality, membership of a particular social group or political opinion" (emphasis added)).

Sess. 10 (1979). The court of appeals' reading of "on account of * * * political opinion" would have precisely the effect Congress sought to avoid.

As this Court has "observed before," "the purposes of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 111 S. Ct. 1138, 1147 (1991) (citing *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987)). Both Houses of Congress recognized that the customary definition of "refugee" included only those persons who had left their native land. S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979). Both also wanted to assist victims of persecution who could not leave their country, such as jailed dissidents and political prisoners. *Ibid.* But the Senate bill proposed to do so by extending asylum eligibility broadly to "any person who has been displaced by military or civil disturbance or uprooted because of arbitrary detention, and who is unable to return to his usual place of abode." S. 643, 96th Cong., 1st Sess. § 201(a) (1979); 125 Cong. Rec. 23,224-23,225 (1979); S. Rep. No. 256, *supra*, at 20.[5] The House of Representatives, in contrast, proposed to help "in such special circumstances as the President * * * may specify, any person who is within the country of such person's nationality * * * and who is persecuted * * *." H.R. 2816, 96th Cong., 1st Sess. § 201(a) (1979); H.R. Conf. Rep. No. 781, 96th

[5] The Senate Report explained that the expanded definition was intended to "accommodate political prisoners and detainees who need resettlement opportunities outside their country" and to "insure maximum flexibility in responding to the needs of the homeless who are of special concern to the United States. This flexibility is needed, for example, to handle such situations as the evacuation of Saigon." S. Rep. No. 256, *supra*, at 4.

Cong., 2d Sess. 2 (1980); S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 2 (1980). The conference committee adopted the House version and rejected the Senate's definition of "refugee," which would have included "displaced persons." See H.R. Conf. Rep. No. 781, *supra*, at 19.

The rejection of the Senate bill is significant. See *INS* v. *Cardoza-Fonseca*, 480 U.S. at 442-443 ("enactment of the House bill rather than the Senate bill" demonstrates that Congress rejected the approach of the Senate bill). It confirms that "on account of * * political opinion" requires the persecutor's disagreement with the victim's political beliefs to be the cause in fact of persecution, for two reasons. First, by refusing to extend asylum eligibility to "displaced persons," Congress rejected the idea that persons who flee 'military or civil disturbance," S. 643, 96th Cong., 1st Sess. § 201(a) (1979); 125 Cong. Rec. 23,224-23,225 (1979), are eligible for asylum. Such persons may genuinely fear random acts of violence, the arbitrary impositions of combatants, or worse;[6] but the grounds of their fear are not tied to the five listed in the Refugee Act.

Second, Congress's *reason* for denying asylum eligibility to "displaced persons" applies with equal (or

[6] Considerable testimony before Congress concerned persons who were not refugees under the customary definition because they had not left their country. Those persons included political prisoners, "displaced persons," and, as one commentator put it, citizens of a country whose government is "so arbitrary that one need not be a member of [a] particular race, religion, nationality, social group or subscribe to any defined political opinion in order to incur its wrath," such as Uganda under Idi Amin. *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 383 (1979).

greater) force to an interpretation of the "on account of * * * political opinion" language that expands the customary notion of "refugee." Although the Conference Committee report did not explain why it rejected the Senate's "displaced persons" bill, other legislative materials indicate that Congress was concerned about the number of persons who would qualify as refugees under the expanded definition. The House committee defended its definition on the ground that it would not "expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. * * * The Committee is of the opinion that the new definition does not create a new and expanded means of entry, but instead regularizes and formalizes the policies and the practices that have been followed in recent years." H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979). On the House floor, Congressman Fascell pointed out that the House definition would not "create the potential for long lines of refugee applicants at U.S. ports abroad." 125 Cong. Rec. 37,201 (1979); see Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 104-105 (requiring the President to inform Congress of, *inter alia*, the number of such persons, the cost of their resettlement, and "the anticipated social, economic, and demographic impact of their admission to the United States"), codified as Immigration and Nationality Act, § 207(e), 8 U.S.C. 1157(e).[7]

[7] The Senate apparently shared the concern of the House of Representatives that the refugee definition not be given an expansive reading. Senator Kennedy, the chief Senate sponsor of the bill, described the Senate definition as intended to "accommodate political prisoners and detainees." 125 Cong. Rec. 23,232 (1979). Senator Kennedy defended the "displaced persons" definition on the Senate floor: "Let me state now, in no uncertain terms, that this change in the legal definition of a refugee will not mean that an unlimited number of refugees can or will be admitted to the United States." *Ibid.* It appears that his colleagues were not persuaded.

The same concern that caused Congress to reject the Senate's "displaced persons" definition inheres in the court of appeals' reading of "persecution on account of * * * political opinion" in the statute Congress passed. The court of appeals reasoned that "persecution is properly categorized as 'on account of political opinion'" if the asylum applicant "express[es] a political opinion" and "the persecutors' motive * * * is political." Pet. App. 12a. But since the court of appeals inferred the expression of a political opinion by respondent because he would not join the guerrillas, the court of appeals' only limit on asylum eligibility is the requirement that the persecutors have a political "motive," or, as the court put it, that the persecutors sought "to further the *group*'s political goals." *Id.* at 18a. Substituting the persecutor's politics for the applicant's removes an essential limit on the definition of "refugee" under the Act. Since guerrilla groups by definition have political goals (overthrowing the incumbent government), any person they attempt to coerce into performing military service would have a "well-founded fear of persecution on account of * * * political opinion." That would "entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum." *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292, 1299 n.5 (11th Cir. 1990) (per curiam).

While that expansive result itself contradicts the legislative intent, the court of appeals' rationale goes

further. If forced recruitment by guerrillas is "on account of * * * political opinion," so, too, must military conscription by the government under the auspices of a draft. Of course "non-governmental groups lack legitimate authority to conscript persons into their armies." Pet. App. 12a. But asylum eligibility under the Refugee Act does not turn on whether persecution is legitimately authorized. Governments throughout history have ordered persecution in punctilious conformity with domestic law. No principled distinction can be drawn between persons recruited by guerrillas and persons conscripted by governments. Under the court of appeals' statutory interpretation, victims of guerrilla recruitment and draft dodgers alike are eligible for asylum.

In fact, the court of appeals' reading of the "on account of" clause opens asylum to anyone with a well-founded fear of physical harm at the hands of a political faction. Assume, for example, that guerrillas need food, uniforms, and money to feed, clothe, and pay their soldiers. Assume further that they extort what they need from townspeople, asking them to choose between "your money or your life." Since, according to the court of appeals, the guerrillas' political motives satisfy the "on account of * * * political opinion" requirement, the townspeople would be eligible for asylum. Thus, the court of appeals' reasoning would extend asylum eligibility far beyond the limit Congress imposed.[8]

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[8] On the other side of the coin, the court of appeals' reasoning would bar asylum to the foraging guerrillas because "[t]he term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42). "Were we to hold

4. Even if it were fair ground for debate whether harm inflicted or threatened in order to achieve a political objective qualifies as "persecution on account of * * * political opinion"—and all the indicia of legislative intent foreclose that interpretation—the court of appeals should have limited its consideration to whether the BIA's interpretation of that phrase was based on a permissible construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The Eleventh Circuit explained in *Perlera-Escobar* that "[t]he meaning and scope of the phrase 'on account of . . . political opinion' is not defined by the Act, nor does it appear from the legislative history that Congress unambiguously expressed an intent that the term should be construed in a particular way." 894 F.2d at 1296. In such a situation, the court of appeals should defer to the BIA's interpretation of the statutory language as long as it is reasonable. See *INS* v. *Cardoza-Fonseca*, 480

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that practices such as attacking military bases, destroying property, or forcible recruiting constitute persecution, members of armed opposition groups throughout the world would be barred from seeking haven in this country. As the concept of what constitutes persecution expands, the group which is barred from seeking haven in this country also expands, so that eventually all resistance fighters would be excluded from relief. We do not believe Congress intended to restrict asylum and withholding [of deportation] only to those who had taken no part in armed conflict." *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 816 (BIA 1988); see *Matter of Canas*, 19 I. & N. Dec. 697, 710 n.13 (BIA 1988); *Matter of Fuentes*, 19 I. & N. Dec. 658, 661-662 (BIA 1988). Compare Pet. App. 12a ("Because non-governmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution.").

U.S. at 448 (ambiguity in term like "well-founded fear" can only be given "concrete meaning" in case-by-case adjudication; in that process, "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program"); cf. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2676-2681 (1990); *Fort Stewart Schools* v. *FLRA*, 110 S. Ct. 2043, 2046 (1990); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990); *Massachusetts* v. *Morash*, 490 U.S. 107, 116-118 (1989); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844; *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972).

The BIA's conclusion that forcible recruitment is not necessarily "persecution on account of * * * political opinion" is reasonable, has been applied consistently, and merits deference. In *Matter of Acosta*, 19 I. & N. Dec. 211, 223 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), the BIA explained that " 'persecution' as used in section 101(a)(42)(A) [8 U.S.C. 1101(a)(42)(A)] clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome." According to the BIA, "the evidence must demonstrate that

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien."

Matter of Acosta, 19 I. & N. Dec. at 226; *Matter of Mogharrabi*, 19 I. & N. Dec. at 446.[9]

"[C]onduct undertaken to further the goals of one faction in a political controversy does not necessarily constitute persecution 'on account of political opinion' so as to qualify an alien as a 'refugee' within the meaning of the Act." *Matter of Acosta*, 19 I. & N. Dec. at 234. " '[P]ersecution on account of political opinion' refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of the persecution." *Id.* at 235. If "there are no facts showing that the guerrillas were aware of or sought to punish" the alien "for his political opinion," then "he does not come within this ground of persecution." *Ibid.*

"[F]orced recruitment by either the guerrillas or the government does not constitute fear of persecution 'on account of political opinion.' " *Perlera-Escobar*, 894 F.2d at 1297 (speaking approvingly of BIA's interpretation to that effect). "[H]arm which may result incidentally from behavior directed at another goal, the overthrow of a government or, alternatively, the defense of that government against

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[9] The BIA's interpretation echoes that of the Office of the United Nations High Commissioner for Refugees, as stated in the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva Sept. 1979). Paragraph 80 states that the "political opinion" ground of persecution "presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant."

an opponent, is not persecution. * * * Thus, the drafting of youths as soldiers, the unofficial recruiting of soldiers by force, the disciplining of members of a rebel group, or the prosecution of draft dodgers are necessary means of achieving a political goal, but they are not forms of persecution directed at someone on account of one of the five categories enumerated in section 101(a)(42)(A) of the Act." *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (BIA 1988); see Pet. App. 32a; *Matter of Canas*, 19 I. & N. Dec. 697, 707 n.7 (BIA 1988) ("[T]he evidence in this case indicates that both the Salvadoran Army and the guerrillas have engaged in the indiscriminate, forcible recruitment of young males in El Salvador. Because of its indiscriminate nature, this forcible recruitment would appear to be a risk inherent in a civil war, rather than a risk of 'persecution.'"); *Matter of Vigil*, 19 I. & N. Dec. 572, 577 (BIA 1988) ("The evidence in the record supports the respondent's statement that the guerrillas forcefully recruit young Salvadoran males. The purpose of this recruitment, however, is to further the guerrillas' objective of overthrowing the Salvadoran Government; the intent of the recruitment is not the persecution of young Salvadoran males on account of one of the five grounds listed in the Act."); *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 513 (BIA 1988) ("The first encounter that the respondent had with the guerrillas was their forced recruitment of him. The respondent was kidnapped by the guerrillas. It does not appear that there were any elements of persecution in this encounter. The guerrillas did not approach him to harm him because they considered him to have characteristics the guerrillas found offensive or which they wished to overcome. The guerrillas wanted him to be a member of their

group, even if his help was not provided willingly, or at least not volunteered."), rev'd, 883 F.2d 788 (9th Cir. 1989).

B. The Guerrillas' Attempt To Coerce Respondent Into Performing Military Service Manifests Their Intent To Field An Army, Not Their Intent To Persecute Respondent On Account Of His Political Beliefs

1. A guerrilla group's forcible conscription in order to field a fighting force and further its political goal of overthrowing the incumbent government, see Pet. App. 12a, 18a, is not, by itself, "persecution on account of * * * political opinion." A guerrilla group may engage in forcible conscription to fill its need for soldiers without any intention to punish its levy for holding incorrect political opinions. That, in fact, is the typical case.[10]

One example is the situation described by the Eleventh Circuit in *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292. Perlera-Escobar was a deserter from a guerrilla force who feared punishment for his defection. *Id.* at 1294. The BIA concluded that Perlera-Escobar was not eligible for asylum because the punishment Perlera-Escobar feared was not "persecution on account of political opinion" since "there was no evidence that the guerrillas' motivations to harm him are other than the need to discipline and deter desertion by its members." *Id.* at 1295. The Eleventh Circuit found reasonable "[t]he BIA's determination that the need to discipline and silence deserters is not persecution on account of 'political opinion' within the meaning of the Act." 894 F.2d at 1298. The

[10] A guerrilla force that focused its recruiting efforts on government supporters would be unusual and short-lived.

court reasoned that "[a] finding of persecution requires some degree of intent on the part of the alleged persecutor to harm the applicant in order to overcome a belief of the applicant." *Ibid.*[11]

Since a guerrilla group may well seek to recruit young men in order to field a fighting force, not to persecute those men for their political opinions, the Ninth Circuit erred in suggesting that a threat to conscript must be presumed to be persecution on account of political opinion unless the INS presents evidence to the contrary. Such a presumption (or in-

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[11] The Eleventh Circuit added:

> In the absence of any evidence that the guerrillas are interested in him for political reasons, the BIA inferred from the record that Escobar is nothing more than a deserter. The record makes it apparent that the guerrillas are a paramilitary organization exercising control and discipline over its members. *It is also apparent that the guerrillas often rely on coercion to recruit soldiers who would not otherwise join them.* From these facts the BIA inferred that in order to maintain order and promote loyalty from its members, the guerrillas must discipline deserters. Without such measures the guerrillas would perish when, as is inevitably the case, the spirit of its fighters wanes. In this respect the guerrillas are similar to any military organization that punishes deserters in order to maintain unity. Moreover, the guerrillas also have an interest in preventing Escobar from divulging their secrets to the government or government-backed groups. Even Escobar admits that the guerrillas are interested in him because of what he knows. *Simply, the guerrillas care not what Escobar thinks or believes; rather their interest in him stems from their need to preserve unity and order in their ranks and to ensure the secrecy of their operations.*

894 F.2d at 1298 (emphases added).

ference[12]) has no basis in fact. Moreover, Section 208(a) of the Act vests in the Attorney General the authority to establish an asylum procedure, 8 U.S.C. 1158(a), and the procedure he has established requires the alien to bear the burden of proving his eligibility for relief, 8 C.F.R. 208.13. See *Matter of Acosta*, 19 I. & N. Dec. at 234 ("Case law and regulations have always made it clear that it is the alien who bears the burden of proving that he would be subject to, or fears, persecution."). The Attorney General's refusal to recognize a presumption such as the one created by the court of appeals is plainly appropriate.

2. The guerrillas' attempt to recruit respondent represented an attempt to draft a soldier, not a threat to inflict harm on a political foe. The certified administrative record does not reveal that respondent has any political opinions at all, let alone a political opinion offensive to the guerrillas. Moreover, his narrative of the encounter, Br. in Opp. App. 4a-5a, does not reveal that he expressed any political opinion to the guerrillas.[13] For their part, "the guerrillas wanted the respondent to join them, and according to respondent's father, even offered to pay the respondent for his services." Pet. App. 32a. The BIA noted that respondent "acknowledges" that the guerrillas attempted to recruit him "in order for him to assist the guerrillas in their attempt to violently

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[12] In response to the government's petition for rehearing, which questioned the panel's use of a presumption, Gov't Rehearing Pet. 7, the panel deleted the word "presumption" and substituted the word "inference." See Pet. App. 5a. Compare 908 F.2d at 1458, with Pet. App. 18a.

[13] In fact, respondent remained for more than two months at the place where he supposedly feared forcible recruitment, and when apprehended in the United States he claimed to have come here for economic reasons. C.R. at 71, 147.

overthrow the Guatemalan Government," and emphasized that "[i]t can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive." *Id.* at 32a-33a.

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Of course, many acts by guerrilla groups—political assassinations, for example—constitute "persecution on account of * * * political opinion." And the potential target of such persecution could introduce his own testimony or other indirect evidence to satisfy the statutory requirements for asylum eligibility. But the purpose of the Refugee Act was not to extend asylum eligibility to all victims of coercion or terror, but only to those who were threatened with persecution for certain reasons. Refusal to serve in someone's army is not one of those reasons.

CONCLUSION

That part of the court of appeals' judgment holding respondent eligible for asylum should be reversed.

Respectfully submitted.

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